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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 DMITRI VALLERVEICH TATARINOV, } Case No. 07cv2033 L (NLS)

I

INTRODUCTION

20 Notwithstanding that the Ninth Circuit Court of Appeals had already entered a
21 final decision on the merits of his final removal order, Petitioner Tatarinov petitioned
22 this Court to vacate his 1996 and 1998 state court convictions and, in the interim, to stay
23 execution of his final order of removal. On May 7, 2008, this Court noted that it lacked
24 jurisdiction to review Petitioner's final order of removal, but entered an order granting
25 Petitioner's request for a stay of the execution of that final order of removal. However,
26 this Court lacks jurisdiction under the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231,
27 Div. B (May 11, 2005), to consider either the challenge to Petitioner's final order of
28 removal or, in the interim, to stay execution of that order.

1 II

2 DISCUSSION

3 Because all that remains in Petitioner's immigration case is the execution of the
4 final order of removal, the Court lacks jurisdiction to address Petitioner's request for a
5 stay. See 8 U.S.C. § 1252(g) ("notwithstanding any other provision of law (statutory or
6 nonstatutory), including section 2241 . . . no court shall have jurisdiction to hear any
7 cause or claim by or on behalf of any alien arising from the decision or action by the
8 Attorney General to commence proceedings, adjudicate cases, or execute removal orders
9 against any alien under this chapter") (emphasis added). Under the REAL ID Act,
10 habeas review is available only over challenges to detention that are independent of
11 challenges to removal. See H.R. Rep. No. 109-72 (2005), reprinted in 2005
12 U.S.C.C.A.N. 240, 300 (stating "section 106 would not preclude habeas review over
13 challenges to detention that are independent of challenges to removal orders. Instead,
14 the bill would eliminate habeas review only over challenges to removal orders."). See
15 also Iasu v. Smith, 511 F.3d 881, 886-87 (9th Cir. 2007) (affirming that the sole and
16 exclusive means under REAL ID Act for alien to challenge his order of removal based
17 on claim of United States citizenship was by filing petition for review of removal order
18 with Court of Appeals; thus, district court lacked jurisdiction to address such claim on
19 federal habeas review); Puri v. Gonzales, 464 F.3d 1038, 1041 (9th Cir. 2006) (holding
20 that the REAL ID Act strips the district court of jurisdiction where claim challenges an
21 order of removal).

22 The Court granted a stay of removal on the basis of Petitioner's collateral attack
23 on the underlying state court convictions that render him deportable because, the Court
24 ruled, he had raised a serious legal issue about whether he had been denied counsel as
25 contemplated by Gideon v. Wainwright, 372 U.S. 335 (1963). This determination,
26 although not permissible under the REAL ID Act, may have been inadvertently invited
27 because, in its Return, the Federal Respondents had argued, in the alternative, that the
28 Court was prohibited from reviewing collateral attacks on removal orders, with the

1 exception of Gideon claims. However, in light the REAL ID Act's clear language, the
 2 rare Gideon exception—to the extent that it exists in immigration proceedings at all—could
 3 only have been raised in, and considered by, the Court of Appeals. This Court should
 4 not have reached the alternative argument, because it lacks subject matter jurisdiction
 5 under the REAL ID Act and other jurisdiction-limiting statutes. As provided by 8 U.S.C.
 6 § 1252(a)(5), “a petition for review filed with an appropriate court of appeals in
 7 accordance with this section shall be the sole and exclusive means for judicial review of
 8 an order of removal entered or issued under any provision of this Act, except as provided
 9 in subsection (e)”).^{1/} See also 8 U.S.C. §§ 1252(b)(9) (“no court shall have jurisdiction,
 10 by habeas corpus under [28 U.S.C. § 2241], or . . . by any other provision of law
 11 (statutory or nonstatutory), to review . . . questions of law and fact . . . arising from any
 12 action taken or proceeding brought to remove an alien from the United States under this
 13 subchapter . . .”); Brito-Lopez v. Mukasey, No. ED CV 07-181-AHM, 2008 WL 793573
 14 at *2 n. 4 (C.D. Cal. Mar. 24, 2008):

15 Petitioner contends that after the Court vacates the state conviction, the
 16 Court can order respondents to vacate the Immigration Judge's removal
 17 order and vacate the execution of the removal order. . . The REAL ID Act
 would prevent this Court from doing so.

18 Id.

20 ^{1/} Any challenge to Petitioner's removal order must be directed to the applicable
 21 court of appeals under the REAL ID Act. 8 U.S.C. § 1252(a)(5), as amended by § 106(a)
 22 of the REAL ID Act, provides:

23 Notwithstanding any other provision of law (statutory or nonstatutory), including
 24 section 2241 of Title 28, or any other habeas corpus provision, and sections 1361
 25 and 1651 of such title, a petition for review filed with an appropriate court of
 26 appeals in accordance with this section shall be the sole and exclusive means for
 27 judicial review of an order of removal entered or issued under any provision of
 28 this chapter, except as provided in subsection (e) of this section. For purposes of
 this chapter, in every provision that limits or eliminates judicial review or
 jurisdiction to review, the terms “judicial review” and “jurisdiction to review”
 include habeas corpus review pursuant to section 2241 of Title 28, or any other
 habeas corpus provision, sections 1361 and 1651 of such title, and review
 pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. § 1252(a)(5).

Indeed, Petitioner has already received judicial review of the removal order before the Ninth Circuit in Tatarinov-Valereveich v. Gonzales, 220 Fed. Appx. 609, 2007 WL 572154 (9th Cir. 2007), and he has pursued his ineffective-assistance-of-counsel claims in the state courts and in Tatarinov v. Superior Court of the State of California, 02cv2029-W (BEN) (S.D. Cal.) (pre-REAL ID Act habeas proceeding), and Tatarinov v. Gonzales, 05-56021 (9th Cir.). Moreover, any issues or challenges Petitioner could have, but did not, raise in his petition for review before the Ninth Circuit are forever lost. See Martinez-Serrano v. INS, 94 F.3d 1256, 1258 (9th Cir. 1996).

III

CONCLUSION

11 Because the Court lacks jurisdiction to review Petitioner's order of removal and
12 lacks authority to grant a stay of the execution of Petitioner's removal order, the Federal
13 Respondents request further briefing on the issue of this Court's subject matter
14 jurisdiction under the REAL ID Act. Alternatively, Federal Respondents ask that the
15 Court reconsider its order granting a stay of Petitioner's removal. See Hajek v.
16 Burlington Northern R.R. Co., 186 F.3d 1105, 1107 (9th Cir. 1999) (concerning the
17 authority of a court to consider its own jurisdiction *sua sponte*).

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Respectfully submitted,

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